84-1360

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF RENTON, *et al.*,
Appellants,

v.

PLAYTIME THEATRES, INC.,
a Washington corporation, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 83-3805, 83-3980

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Plaintiffs-Appellants,

v.

THE CITY OF RENTON, *et al.*,
Defendants-Appellees.

THE CITY OF RENTON,
a municipal corporation, *et al.*,
Plaintiffs-Appellants,

v.

PLAYTIME THEATERS, INC.,
a Washington corporation, *et al.*,
Defendants-Appellees.

Argued and Submitted May 9, 1984

Decided Nov. 28, 1984

Robert Eugene Smith, Encino, Cal., for Playtime Theaters, Inc.

Lawrence J. Warren, Daniel Kellogg, Warren & Kellogg, Renton, Wash., for City of Renton.

Appeal from the United States District Court
for the Western District of Washington

Before FLETCHER and FARRIS, Circuit Judges, and JAMESON,* District Judge.

FLETCHER, Circuit Judge:

These consolidated cases are declaratory judgment actions involving the constitutionality of the City of Renton's zoning ordinances regulating the location of adult motion picture theaters.

In case number 83-3805, Playtime Theaters, Inc. ("Playtime") appeals the district court's order denying a permanent injunction and finding that the ordinance furthers a substantial governmental interest, is unrelated to the suppression of speech, and is no more restrictive than necessary to further that interest. Case number 83-3980 is a declaratory action involving the same parties and issues, filed by the City of Renton in state court after federal proceedings had begun. This action was twice removed to federal court and twice remanded to state court. Renton appeals the district court's denial of its motion for fees and costs on the second removal. We reverse in number 83-3805 and affirm in number 83-3980.

I

BACKGROUND

In April, 1981, the City of Renton enacted ordinance number 3526 which prohibited any "adult motion picture theater" [1] within one thousand feet of any residential

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* Hon. William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

[1] The first ordinance defined an "adult motion picture theater" as an enclosed building used for presenting motion picture films,

zone or single or multiple family dwelling, any church or other religious institution, and any public park or area zoned for such use. The ordinance further prohibited any such theater from locating within one mile of any public or private school. At the time this ordinance was enacted, no adult theaters were located in Renton, although there were other theaters within the proscribed area.

In January, 1982, Playtime acquired two existing theaters in Renton with the purpose of exhibiting adult motion pictures in at least one, the Renton Theater, which is

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video cassettes, cable television, or any other such visual media, distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as hereafter defined, for observation by patrons therein.

The ordinance defined these terms as follows:

2. *"Specified Sexual Activities"*:

(a) Human genitals in a state of sexual stimulation or arousal;

(b) Acts of human masturbation, sexual intercourse or sodomy;

(c) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

3. *"Specified Anatomical Areas'*:

(a) Less than completely and opaquely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola; and

(b) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

The second ordinance expanded the defined term of "used" as:

a continuing course of conduct of exhibiting "specific [sic specified?] sexual activities" and "specified anatomical area["] in a manner which appeals to a prurient interest.

located within the area proscribed by ordinance number 3526.[2]

Just prior to closing the sale of the theater, on January 20, 1982, Playtime filed an action in federal court, seeking a declaration that the ordinance was unconstitutional and a permanent injunction against its enforcement.

A month later, on February 19, 1982, Renton brought suit in state court seeking a declaratory judgment that the ordinance was constitutional on its face and as applied to Playtime's proposed use. The complaint alleged that an actual dispute existed because of the pending federal lawsuit and because Playtime asserted that the ordinance was unconstitutional. On February 22, 1982, Renton moved to dismiss Playtime's federal action on the grounds that the federal court should abstain in favor of the state action, citing *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975).

On March 8, 1982, Playtime removed the state action to federal court and Renton moved to remand. On March 25, the magistrate filed his recommendation that abstention was improper in the first action and on April 9, he recommended that the removed state action be remanded for lack of jurisdiction because the complaint failed to state a claim upon which relief could be granted. The district court approved both recommendations, denying the motion to dismiss the federal action on May 5, 1982, and remanding the state action on January 13, 1983.

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[2] For the purposes of this opinion, "adult motion picture theater" or "adult theater" refers to the definition used by the City. *See supra* note 1. We express no view as to the effect of this definition on the constitutionality of the ordinance. *See infra* note 18.

On May 3, 1982, Renton passed an emergency ordinance, amending ordinance number 3526. The new ordinance added an elaborate statement of reasons for the enactment of the ordinances,[3] it further defined the word

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[3] The City gave the following reasons in the amended ordinance:

1. Areas within close walking distance of single and multiple family dwellings should be free of adult entertainment land uses.
2. Areas where children could be expected to walk, patronize or recreate should be free of adult entertainment land uses.
3. Adult entertainment land uses should be located in areas of the City which are not in close proximity to residential uses, churches, parks and other public facilities, and schools.
4. The image of the City of Renton as a pleasant and attractive place to reside will be adversely affected by the presence of adult entertainment land uses in close proximity to residential land uses, churches, parks and other public facilities, and schools.
5. Regulation of adult entertainment land uses should be developed to prevent deterioration and/or degradation of the vitality of the community before the problem exists, rather than in response to an existing problem.
6. Commercial areas of the City patronized by young people and children should be free of adult entertainment land uses.
7. The Renton School District opposes a location of adult entertainment land uses within the perimeters of its policy regarding bussing of students, so that students walking to school will not be subjected to confrontation with the existence of adult entertainment land uses.
8. The Renton School District finds that location of adult entertainment land uses in areas of the City which are in close proximity to schools, and commercial areas patronized by students and young people, will have a detrimental effect upon the quality of education which the School District is providing for its students.
9. The Renton School District finds that education of its students will be negatively affected by location of adult entertainment land uses in close proximity to location of schools.
10. Adult entertainment land uses should be regulations [sic] by zoning to separate it from other dissimilar uses just as

Four years later, the Supreme Court of Washington, sitting *en banc*, unanimously upheld two zoning ordinances that required adult theatres to be located in certain downtown areas of Seattle. *Northend Cinema, Inc.* v. *City of Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978). Reciting extensive studies demonstrating the problems created by such theatres in residential and commercial areas, the court held that even though some ten adult theatres would be forced to relocate, the ordinances were valid under *Young*. The residents of Seattle had expressed concerns about the attraction of transients, parking and traffic problems, increased crime, decreasing property values, and interference with parental responsibilities toward children. "In short, the goal of the City in amending its zoning code was to preserve the character and quality of residential life in its neighborhoods * * *. A second and related goal * * * was to protect neighborhood children from increased safety hazards, and offensive and dehumanizing influence created by location of adult movie theatres in residential areas." 585 P.2d at 1155.

The effect of the Seattle restrictions was to force adult theatres into an area consisting of approximately 250 acres (or less than 1% of the city's acreage). *Id.* at 1156. Noting that this Court had approved the "concentration" as well as the "dispersal" method of zoning theatres in *Young*, the Washington Supreme Court ruled that Seattle's planning effort "must be accorded a sufficient degree of flexibility for experimentation and innovation." 585 P.2d at 1159. This Court denied certiorari in the case. 441 U.S. 946 (1979).

A year later, and partly as a result of these two decisions, events began unfolding in Renton, Washington.

Appellant Renton is a small city, with a 1981 population of 32,200,[2] whose northern border is approximately

[2] Cl. aff., Jan. 27, 1982, at 1. The terms "aff.", "test." and "dep." refer to "affidavit," "testimony" and "deposition", respectively. "Cl." refers to David R. Clemens, Renton's Policy Development Director; "And." refers to Bruce Anderson, an associate real estate broker testifying for Appellee Playtime; "Forbes" refers to Roger H. Forbes, President of Playtime; "John." refers to Jimmy Johnson, an executive with a company that acquires adult theatres; and "Burns" refers to Jack R. Burns, a Playtime attorney.

one mile from the southern border of Seattle. In mid-1980, the Renton City Council began to study the regulation of adult entertainment land uses.[3] The Council and its Planning and Development Committee held numerous meetings—all of them open to the public—to consider this issue.[4] Testimony was taken at several meetings. At one meeting, for example, 64 persons attended, and 28 of them spoke.[5] Among those offering statements were the head of the Renton Chamber of Commerce and the Superintendent of Schools.[6] There was testimony about adult theatres in relation to their impact on commercial property values, concern about crime, the deterioration of residential neighborhoods, effects on children, etc.[7] In the meantime, the office of the City's Acting Planning Director had received and studied documents from Seattle underlying that city's own ordinance, including a summary of findings and conclusions, and the Director had studied the *Northend Cinema* decision.[8] This Court's findings and decision in *Young* were also reviewed,[9] as well as the approaches taken by numerous other cities, inside and outside the State of Washington.[10] There was a report from the Renton City Attorney's office and from the Acting

[3] Burns aff., Jan. 27, 1982, at Exs. 1-10.

[4] Cl. dep., Mar. 3, 1982, at 41-44. The Committee alone held at least six meetings. *Id.*

[5] Cl. aff., Jan. 27, 1982, at 3; *see also* Cl. dep., Mar. 4, 1982, at 35.

[6] Cl. test., Jan. 29, 1982, at 27-29; Cl. dep., Mar. 3, 1982, at 45-48.

[7] Cl. dep., Mar. 4, 1982, at 14; Cl. test., Jan. 29, 1982, at 34; Cl. aff., Jan. 27, 1982, at 3-5. *See also* Renton, Wa., Ordinance 3629 (May 3, 1982), App. 81a.

[8] Cl. test., Jan. 29, 1982, at 31-33.

[9] Cl. dep., March 4, 1982, at 7-8.

[10] *Id.* at 5-12, 50-52.

Planning Director, who himself had had prior experience with similar problems in California.[11] All of these proceedings were carried out in the usual way, following normal City Council procedures.[12]

After almost a year's study of adult uses, the City Council adopted an ordinance (No. 3526) on April 13, 1981, which defined an "adult motion picture theater" in terms of a building "used for" the exhibition of visual media depicting "specified sexual activities" or "specified anatomical areas." App. 78a. It prohibited such theatres from locating within 1,000 feet of any residential area, church, park, or religious facility or institution, or within one mile of any school. The ordinance was modeled after, and was virtually identical to, the ordinances that had been approved in *Young* and *Northend Cinema*. *See* App. 99a-139a (where the Detroit and Seattle ordinances are set forth in their entirety). At the time the first Renton ordinance was enacted, there were no adult theatres located in Renton, nor any sign that one would move into the city.

Nine months later, on January 20, 1982, Appellees Playtime Theatres, Inc.,[13] and Kukio Bay Properties, Inc., brought a suit in the United States District Court for the Western District of Washington alleging that Kukio had contracted to purchase two motion picture theatres in downtown Renton and to lease them to Playtime.[14]

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[11] Cl. aff., Jan. 27, 1982, at 3; Cl. test., Jan. 29, 1982, at 33-34; Cl. dep., Mar. 4, 1982, at 17.

[12] Cl. dep., Mar. 4, 1982, at 24-25.

[13] Playtime was the same company that had operated adult theatres in Seattle, Tacoma, and at least three other cities in the State of Washington. Forbes dep., Apr. 9, 1982, at 6, 8.

[14] Playtime's President admitted that he was fully aware in December or January, when he was considering the possibility of entering Renton, that there was an ordinance then in place prohibiting adult theatres in the area where he was seeking to locate. Forbes dep., May 27, 1982, at 15-17.

Kukio and Playtime conceded in their Complaint that their theatres would "continuously operate exhibiting adult motion picture film fare to an adult public audience." App. 61a. The Complaint alleged (App. 67a-71a) that Renton's ordinance was unconstitutional on its face and as applied to the plaintiffs under, among other things, the First and Fourteenth Amendments, and that it was not susceptible of a constitutional construction. App. 68a-69a. Kukio and Playtime (hereinafter collectively "Playtime") sought, *inter alia*, a declaratory judgment and a preliminary and permanent injunction. App. 75a-76a.

On May 3, 1982, the City Council passed a second zoning ordinance (No. 3629), amending the prior one. Insofar as relevant here, the amendment (a) spelled out the fact that in passing the prior ordinance, the City Council had relied upon the decisions in *Young* and *Northend Cinema* (App. 81a); (b) summarized some of the testimony received at its public hearings (App. 81a-85a); (c) set forth findings of fact that had formed the basis of the prior ordinance (*id.*); (d) defined "used" in the prior ordinance to mean "a continuing course of conduct" (App. 87a); and (e) reduced the restriction on locating near schools from one mile to 1,000 feet. App. 87a.[15]

Among the City Council's findings were these: (1) the location of adult theatres in close proximity to residential areas, churches, parks, and schools may lead to increased criminal activities, including prostitution; (2) the location of adult theatres has a deteriorating effect on the areas of the city in which they are located; and (3) reasonable regulation of adult theatre locations will pro-

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[15] The amendment also declared a state of emergency to exist, and it included a severability clause and a declaration that a violation of the ordinance was a public nuisance, which was subject to abatement by civil action. App. 88a-89a.

tect the character of the community and its property values while providing access to those who desire to patronize adult theatres. App. 82a-84a.

Finally, on June 14, 1982, the City Council, on advice of counsel, adopted a third ordinance (No. 3637) which reenacted Ordinance 3629 without an emergency clause. App. 90a. These three ordinances will hereinafter be referred to collectively as "the ordinance".

By drawing a series of circles around the areas restricted by the ordinance, one could determine that the effect of the ordinance was to set aside 520 acres within which adult theatres could locate.[16] The set-aside zone contained "primarily developed, existing commercial development of various types" as well as "areas that are currently underdeveloped and in the process of transition to developed uses." [17] The area set aside included land "in all stages of development from raw land to developed, improved and occupied office space, warehouse space and industrial space." [18]

After a hearing, a Magistrate submitted a report recommending that Renton's ordinance be held in violation of the First Amendment. App. 37a.[19] A preliminary injunction issued, but the District Court later granted summary judgment in Renton's favor and dissolved the injunction.

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[16] Cl. aff., May 26, 1982, at 2.

[17] Cl. test., June 23, 1982, at 62.

[18] Cl. aff., May 26, 1982, at 2.

[19] There were several attempts by Renton to have the District Court abstain in favor of the state court, but both courts below held that federal jurisdiction was appropriate. Even though we believe the courts below were in error in regard to abstention (*cf. Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975); *Middlesex County Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423 (1982)), that issue is not pursued in this appeal.

The District Court ruled that Renton's ordinance "in its essential features is virtually identical" to the Detroit and Seattle ordinances, except that the word "used" was more precisely defined in the Renton ordinance. App. 26a. The intrusion into First Amendment interests was not substantial because the ordinance's restrictions were even narrower than those in the Detroit and Seattle ordinances, no theatre had been closed, there was no content limitation, and the availability of 520 acres contradicted the notion of a substantial restriction on protected speech. According to the District Court, the burden of having to locate a theatre within the set-aside area was no different than the burden upon other land users "who must work with what land is available to them in the city." App. 27a. The trial court found that the acreage available to Playtime and other adult theatres was comprised of land "in all stages of development * * * that is criss-crossed by freeways, highways, and roads * * *." App. 28a.

Furthermore, the District Court found that Renton's ordinance met all four parts of the *O'Brien* test.[20] In particular, Renton's articulated interests in protection of its community through zoning were furthered by its ordinance. There was no evidence that the secondary effects of adult land uses in Renton would be different than those in Seattle, Tacoma, or Detroit, and the experience of other cities and towns "must constitute some evidence" for the City Council to consider; the "observed effects in nearby cities provides persuasive circumstantial evidence of the undesirable secondary effects" Renton was attempting to obviate. Renton, according to the District Court, was entitled to experiment in this admittedly delicate and serious area. App. 30a. While some citizens at public meetings predictably expressed concerns that would have formed an impermissible basis for the ordi-

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[20] *See* n.1, *supra*.

nance, these statements "should not negate the legitimate, predominate concerns of the City Council * * *." App. 31a. Thus, because Renton's "effort to preserve the quality of its urban life * * * is minimally intrusive of a particular category of [the] protected expression" described in *Young* (App. 32a), the District Court granted Renton's motion for summary judgment.

The Ninth Circuit reversed and held Renton's ordinance in violation of the First Amendment. App. 22a. It refused to review the District Court's *O'Brien* rulings under a clearly erroneous test but instead considered them as mixed questions of law and fact, subject to *de novo* review. The Ninth Circuit ruled:

1. Renton improperly relied on the experience of other cities in trying to prove a significant governmental interest to support its enactment. The Court of Appeals distinguished Renton's ordinance from that in *Young* because Detroit's ordinance *dispersed* adult theaters, whereas Renton's *concentrated* them in one area. App. 17a. Furthermore, Renton had to "justify its ordinance in the context of *Renton's* problems—not Seattle's or Detroit's problems." *Id.*; emphasis in original. "Renton has not studied the effects of adult theaters and applied any such findings to the particular problems or needs of Renton." App. 19a. Detroit's studies "are simply not relevant to the concerns of the Renton ordinance * * *." *Id.*

2. Without disagreeing that 520 acres were outside the restricted zone, the court concluded that the land was not "available" in the constitutional sense because "a substantial part" was undeveloped or already occupied by various industrial and commercial concerns. App. 13a.

3. Because some citizens at public hearings had expressed disapproval of adult movies, there was "at least an inference that a motivating factor behind the ordinance was suppression of the content" of speech. The

test was not the "predominate" concern of the City Council; where mixed motives are apparent, the test is whether "'*a motivating factor* in the zoning decision was to restrict'" First Amendment rights.[21]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Cities and towns across the country have struggled since *Young* to regulate the location of adult establishments within their borders. Only a few of their zoning ordinances have been upheld—and only *one* federal Circuit has sustained the validity of a *Young*-style adult theatre ordinance on the merits.[22] Most have been struck

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[21] App. 20a (quoting *Tovar* v. *Billmeyer*, 721 F.2d 1260, 1266 (9th Cir. 1983) (emphasis by the *Playtime* court), *cert. denied*, 105 S. Ct. 223 (1984)).

One sentence in the Court of Appeals' decision (App. 20a-21a) could be read to mean that this case was being remanded for further hearings on the issue of intent. The Ninth Circuit's remand "for proceedings consistent with this opinion" does not, of course, preclude this Court from treating the lower court's decision as final for purposes of appeal. *See generally Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 603 (1926); *Gulf Refining Co.* v. *United States*, 269 U.S. 125, 136 (1925). Moreover, this case is not interlocutory as it relates to the issues here presented for review.

Subsequent to the decision below, Playtime filed with the District Court a "Motion for Entry of Judgment" with an accompanying memorandum arguing that the record is complete and may not be supplemented, and therefore the only remaining course of action now open, consistent with the Ninth Circuit's opinion, is the entry of a judgment declaring the Renton ordinance unconstitutional, granting a permanent injunction, and setting the matter down for a hearing on Playtime's damage claims.

Even if Playtime is wrong in its Motion, any new proceeding would require Renton to submit evidence under the wrong standard, as demonstrated below.

[22] *Genusa* v. *City of Peoria*, 619 F.2d 1203 (7th Cir. 1980). *See also Northend Cinema, Inc.* v. *City of Seattle*, *supra*; *City of Whittier* v. *Walnut Properties, Inc.*, 149 Cal. App. 3d 633, 197 Cal. Rptr. 127 (2d Dist.), *vacating* 189 Cal. Rptr. 12 (2d Dist. 1983); *County*

down because of an actual or practical unavailability of alternative sites,[23] an intent to inhibit,[24] or the effect of inhibiting,[25] one or more existing or imminent adult establishments; and/or an intent to suppress the content of adult films.[26] In summary, *Young*-style ordinances

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of Sacramento v. *Superior Court*, 137 Cal. App. 3d 448, 187 Cal. Rptr. 154 (3d Dist. 1982); *Hart Book Stores, Inc.* v. *Edmisten*, 612 F.2d 821 (4th Cir. 1979) (statutory prohibition against two adult establishments in one building tantamount to zoning and upheld under *Young*), *cert. denied*, 447 U.S. 929 (1980); *Lydo Enterprises, Inc.* v. *City of Las Vegas*, 745 F.2d 1211 (9th Cir. 1984) (appeal from preliminary injunction).

[23] *E.g.*, *Basiardanes* v. *City of Galveston*, 682 F.2d 1203, 1209, 1212, 1214 (5th Cir. 1982); *Alexander* v. *City of Minneapolis*, 531 F. Supp. 1162, 1168-69 (D. Minn. 1982), *aff'd*, 698 F.2d 936 (8th Cir. 1983); *CLR Corp.* v. *Henline*, 520 F. Supp. 760, 767 (W.D. Mich. 1981), *aff'd*, 702 F.2d 637 (6th Cir. 1983); *Purple Onion, Inc.* v. *Jackson*, 511 F. Supp. 1207, 1209, 1214, 1215-17 (N.D. Ga. 1981); *E&B Enterprises* v. *City of University Park*, 449 F. Supp. 695, 697 (N.D. Tex. 1977); *Bayside Enterprises, Inc.* v. *Carson*, 450 F. Supp. 696, 701-702 (M.D. Fla. 1978). *Cf. Lydo Enterprises, Inc.* v. *City of Las Vegas*, 745 F.2d at 1213-15 (preliminary injunction denied where theatre owner failed to show that alternative sites were not available); *Deerfield Medical Center* v. *City of Deerfield Beach*, 661 F.2d 328, 336 (5th Cir. 1981) (re abortion clinics); *Keego Harbor Co.* v. *City of Keego Harbor*, 657 F.2d 94, 96-99 (6th Cir. 1981) (ordinance totally prohibited adult theatres).

[24] *E.g.*, *Tovar* v. *Billmeyer*, 721 F.2d at 1264-65; *Kuzinich* v. *County of Santa Clara*, 689 F.2d 1345, 1348-49 (9th Cir. 1982); *Basiardanes* v. *City of Galveston*, 682 F.2d at 1216; *Avalon Cinema Corp.* v. *Thompson*, 667 F.2d 659, 661-662 (8th Cir. 1981). *See also Ebel* v. *City of Corona*, 698 F.2d 390, 393 (9th Cir. 1983); *Fantasy Book Shop, Inc.* v. *City of Boston*, 652 F.2d 1115, 1119, 1124-25 (1st Cir. 1981).

[25] *E.g.*, *Alexander* v. *City of Minneapolis*, 531 F. Supp. at 1170; *Purple Onion, Inc.* v. *Jackson*, 511 F. Supp. at 1212, 1217, 1224. *Cf. Bayou Landing, Ltd.* v. *Watts*, 563 F.2d 1172, 1175 (5th Cir. 1977), *cert. denied*, 439 U.S. 818 (1978).

[26] *E.g.*, *Purple Onion, Inc.* v. *Jackson*, 511 F. Supp. at 1210; *E&B Enterprises* v. *City of University Park*, 449 F. Supp. at 697. *Cf. Bayou Landing, Ltd.* v. *Watts*, 563 F.2d at 1175.

have been upheld only in the Seventh Circuit and have been stricken on various grounds by Circuit courts in the First, Fifth, Sixth, Eighth, and Ninth Circuits.

This case demonstrates only too well the problems faced by cities seeking to limit the effects of adult theatres on their communities, while leaving a reasonable outlet for adult film fare. Before any theatre had entered the city, Renton held lengthy hearings in the democratic fashion, letting all interested residents have their say and following its usual and normal legislative procedures. It studied what had occurred in other jurisdictions, but it tailored its ordinance to fit Renton's particular circumstances. The City Council set forth detailed findings and reasons for its action. Its ordinance did not unduly inhibit speech; instead, it set aside what the District Court found was a "large percentage of land within the city" (App. 27a) for the location of adult theatres and for the showing of their films. Yet Renton's attempt went for naught. The Ninth Circuit, reviewing the District Court's findings *de novo*, struck down Renton's ordinance as unconstitutional. The Court of Appeals was wrong in several crucial respects.

1. Renton Properly Relied on the Experience of Other Cities

The Ninth Circuit erred in ruling that Renton could not rely upon the experience of other cities in enacting its adult theatre zoning ordinance.

Although purporting to rely upon *Young*, the court failed to note that the Detroit ordinance approved in that case was itself based in part upon the experience of other cities. As Justice Powell noted in his concurring opinion, the evidence introduced before the Detroit City Council "consisted of reports and affidavits from sociologists and urban planning experts, as well as some laymen, on the cycle of decay *that had been started in areas of other*

cities, and *that could be expected in Detroit*, from the influx and concentration of such establishments." 427 U.S. at 81 n.4 (Powell, J., concurring); emphasis added.[27]

Moreover, the Ninth Circuit's ruling would effectively prohibit any city from enacting an ordinance in advance of the entry of adult theatres into its environs. A city can hardly rely upon its own experiences unless and until adult theatres build or buy within the city limits and introduce the deleterious effects that the ordinance is designed to obviate in the first instance. Must a city really wait until adult theatres have started the "cycle of decay" that has already been found to evolve in other areas? Nothing in *Young* or any other of this Court's decisions requires such a result.[28]

This concept is especially pertinent here, where Renton was relying in part upon an ordinance adopted by a city located virtually on its borders. Renton was not reaching out and relying entirely upon the experience of cities located in areas very different from its own—as was at least partially true in *Young* (*see* n.27, *supra*). Renton, virtually a suburb of Seattle, could legitimately conclude that whatever problems Seattle had encountered would soon be its own—when and if an adult theatre moved into Renton.[29]

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[27] Justice Powell's statement was supported by the record in that case. Experts recited their experiences in many different cities and towns in Michigan (Appendix in *Young* at 18-19), New York City (*id.* at 30, 35), and cities in countries as far away as Sweden, Denmark, West Germany, France, Britain and Italy. *Id.* at 32.

[28] On the contrary, were a city to await the entry and deleterious effects of adult theatres, it would run the risk encountered by other cities of being accused of drawing its zoning lines with the intent of closing down a particular theatre (or theatres) already operating within its borders. *See, e.g.*, cases cited in n.24, *supra*.

[29] Moreover, Renton's ordinance can hardly be said to have imposed an onerous economic burden on Playtime. Any disadvantage it suffered was of its own doing, with full knowledge of the facts. *See* n. 14, *supra*.

The opinion below imposes an impermissible burden on cities and towns. If they cannot rely upon the experiences of others, they must replicate within their own borders the testimony, exhibits and evidence already introduced elsewhere. Particularly for small cities and towns, such a requirement can be prohibitively expensive and impractical. Again, nothing in this Court's decisions requires such a result, and the facts in *Young* support an opposite conclusion.

The decision below, although supported by language from other Circuits in several other cases,[30] is in direct conflict with the Seventh Circuit's decision in *Genusa* v. *City of Peoria*, *supra*. There, the argument was made that Peoria's ordinance should be struck down because the City had not conducted its own surveys or relied upon its own experiences, but instead had based its conclusions on what had occurred in other cities. The Seventh Circuit rejected that argument:

> Even though here, unlike in *Young*, the city has not demonstrated a past history of congregated adult uses causing neighborhood deterioration, we agree with the district court that a city need not await deterioration in order to act. A legislative body is entitled to rely on the experience and findings of other legislative bodies as a basis for action. There is no reason to believe that the effect of congregated adult uses in Peoria is likely to be different than the effect of such congregations in Detroit. [619 F.2d at 1211; footnote omitted.]

The California state courts also disagree with the approach taken by the Ninth Circuit. In one case, for example, a court wrote:

> Goldie [an adult book store operator] asserts that the identical ordinance must be tested anew each

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[30] *See, e.g., Avalon Cinema Corp.* v. *Thompson*, 667 F.2d at 661-662; *see also CLR* v. *Henline*, 520 F. Supp. at 767.

time it is enacted by a different governmental entity by establishing the actual existence of local conditions which would justify it. Goldie's thesis would deny to lawmakers in one locale the benefit of the wisdom and experience of lawmakers in another community, no matter how similar the circumstances; it would, as it were, require the reinvention of the wheel countless times over when mere access to common knowledge would render the considerable effort involved unnecessary. [*County of Sacremento* v. *Superior Court*, 137 Cal. App. 3d at 455, 187 Cal. Rptr. at 158.[31]]

The Ninth Circuit's contrary ruling imposes impermissible and wholly unnecessary burdens on municipal legislative bodies. There is simply no basis for courts setting such arbitrary guidelines for the types of "evidence" a city council may consider in its legislative processes.

2. Renton Set Aside a Permissible Zone for the Location of Adult Theatres

The court below ruled that, even though Renton had effectively set aside 520 acres of land on which adult theatres could locate, this land was constitutionally "unavailable" because a portion of it is presently undeveloped, or is developed for existing commercial uses. App. 13a-14a.

The Ninth Circuit gave no thought to, and made no accommodation for, the problem of small communities. Under its approach, in fact, the more incompatible a

[31] *See also Ebel* v. *City of Corona*, 698 F.2d at 392, where the objection that the City Council had not made adequate findings of fact was rejected by the court because the city "gave notice, held hearings, issued a report of the City Planning Commission, and gave reasons for its action in the preamble to the ordinance", and this was all that was required for a "legislative act". *Accord, Lydo Enterprises, Inc.* v. *City of Las Vegas*, 745 F.2d at 1215. *Cf. Fantasy Book Shop, Inc.* v. *City of Boston*, 652 F.2d at 1125.

theatre is with the quality of the community, the greater its right to locate there. A small, predominantly residential city or town with a centrally located, modest commercial development will be unlikely to have much space "available" for adult theatres. Yet under the Ninth Circuit's reasoning, it has less power to protect itself than cities like Detroit with more space and many similar uses.

But even if the focus is properly on the practical availability of Renton's own set-aside zone, the Ninth Circuit was wrong. To begin with, it misconstrued the record in important respects. The court cited such properties as the Longacres Racetrack and a city sewage plant as being within the set-aside area, when in fact the racetrack and the plant are clearly and unequivocably *outside* the set-aside area.[32] The confusion can only be accounted for by the fact that the court relied on a map, and accompanying testimony, submitted at an early TRO hearing in this case,[33] *prior* to the time that the permissible distance from schools was reduced from one mile to 1,000 feet. The map also contained a number of errors because it had to be prepared within a few hours' time.[34] When the errors were corrected and the ordinance as amended taken into consideration, the set-aside area became substantially different (and larger),[35] and many of the "uses" included by the Ninth Circuit fell outside the set-aside area.[36] The court's error was particularly egregious

[32] *See* maps at App. 140a-142a.

[33] Cl. test., June 23, 1982, at 77, 84; *see* Cl. aff., Jan. 27, 1982 (incl. map).

[34] Cl. test., June 23, 1982, at 77-85.

[35] The TRO testimony, prior to correction, estimated the size of the set-aside area to be approximately 400 acres, with about half of it unoccupied. *See* Cl. dep., Mar. 3, 1982, at 30-40.

[36] *Compare* map attached to Cl. aff., Jan. 27, 1982, *with* map attached to Cl. aff., May 26, 1982.

because it treated the District Court's findings as part "law," reviewed them *de novo*, and overturned them.

In addition to its view of the facts, the Ninth Circuit's underlying thesis is fatally flawed. Its approach raises serious concerns of great import to cities and towns throughout the country. The court assumed that unless property is immediately available for purchase from a willing seller, the ordinance has the effect of " 'suppressing, or greatly restricting access to, lawful speech.' " [37]

Even if an ordinance resulting in a "substantial restriction" on the showing of adult films would violate the First Amendment, that is clearly not the case in situations like this one. We begin with the fact that Renton did not set aside a small, restricted area of land. The set-aside area is physically large enough to accommodate more than 400 theatres and surrounding parking lots.[38] It constitutes over 4% of all the land in the City (as compared to Seattle's set-aside area of less than 1%).[39] Its acreage is larger than one-fourth of the entire area of Renton occupied by single-family residences and exceeds the amount of land in the City used for parks and recreation.[40] Witnesses for both Renton and Playtime testified that much of the 520 acres is simply unoccupied land, adjoined and criss-crossed by both highways and interior

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[37] App. 13a n.11 (quoting *Young*, 427 U.S. at 71 n.35).

[38] Playtime's own attorney assumed that an adult theatre seating 400 persons would require 6000 sq. feet of space. Cl. dep., Mar. 3, 1982, at 68-72. Renton's Policy Development Director testified that such a building would need 40,000 additional sq. feet for parking, plus or minus 10% for error, or a maximum total of 52,000 sq. feet for the entire theatre area. *Id.* A 520-acre area would encompass 22,651,200 sq. feet, or some 435 theatre areas.

[39] Cl. aff., Jan. 27, 1982, at 6. This estimate for Renton was made before the set-aside zone was enlarged by the second ordinance. Therefore, the percentage today would be even larger.

[40] Cl. aff., Jan. 27, 1982, at 2.

access roads.[41] So long as this land is within reasonable driving distance of the City's populated areas [42] and physically accessible, why is it not constitutionally "available" for the location of adult theatres? The Court of Appeals does not say. The court does assume, however, that a "fully-developed shopping center" and "a business park containing buildings suitable only for industrial use" are not constitutionally "available".[43] This theme apparently follows the approach of Playtime's real estate expert, who testified that much of the land was not "available" because it was occupied, and a number of property owners told him they would not sell to an adult theatre owner.[44]

This approach is wholly specious for two reasons. First, property can be purchased through third parties, with the identity of the true purchaser disguised. But even more importantly, the court's approach gives the adult theatre owner a preferred position above every other potential purchaser of property. He does not have to compete in the marketplace for property like everyone else, including drug stores, hair salons and theatre owners showing regular fare. Even the business offices of the media, also protected by the First Amendment, enjoy no such privilege.[45] Under the Ninth Circuit's thesis, a city

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[41] Cl. aff., May 26, 1982, at 2-3; John. test., June 23, 1982, at 29-31; Cl. test., June 23, 1982, at 54-59, 61-62, 84-85; Cl. test., Jan. 29, 1982 at 16-17, 27, 42-43, 49-50, 51, 53, 56-57, 61-64; And. aff., June 15, 1982, at 4-9.

[42] The entire land area of Renton consists of only 15.3 square miles. Cl. aff., Jan. 27, 1982, at 1.

[43] App. 13a. There was, however, unrebutted testimony that theatres *can* be built in areas designated "industrial park." Cl. test., Jan. 29, 1982, at 60, 63-64.

[44] And. aff., June 15, 1982, at 5-8.

[45] Churches, too, must obey zoning laws in the free exercise of their religion and must buy property under the ordinary rules of

must establish the existence of a "turnkey" location for the adult theatre operator; property must stand ready to be sold to such an operator from a willing seller. This reasoning is in direct conflict with the view of those courts (including the Seventh Circuit) which have upheld set-aside areas (*see* n.22, *supra*), and we submit that it was never the intent of this Court in *Young*.

A set-aside zone should be deemed "available" in the constitutional sense when it is accessible—both in terms of distance from populated areas of the city and in terms of internal streets and highways—and when an ordinary theatre operator could build or buy a theatre there at such time as property becomes available in the ordinary course of business. The fact that others have already built or bought within the area should not be a disqualification; to the contrary, it demonstrates that the zone is a frequented, accessible and desirable area. That some present owners express no immediate desire to sell is also not a disqualifying factor; that is a fact of life faced by all potential purchasers.[46] Owners constantly change their minds, either voluntarily or through the vicissitudes of business life.

In summary, if Renton's set-aside zone is not constitutionally "available," it is fair to say that virtually no

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supply and demand. *See American Communications Ass'n* v. *Douds*, 339 U.S. 382, 397-398 (1950); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc.* v. *City of Lakewood*, 699 F.2d 303, 307-309 (6th Cir.), *cert. denied*, 104 S. Ct. 72 (1983).

[46] It should be noted, however, that even Playtime's real estate witness could not testify that all property owners within the set-aside zone would not sell. Some owners told him they *would* sell, some said they did not think the property was "suitable" for this use, and he could not reach others. And. aff., June 15, 1982, at 4-9. And even some 22 acres owned by the City is not wholly immune from sale to third parties. In fact, the City Council voted as recently as five months ago that in the future the City would study the possible "purchase, trade or sale" of certain of its property. Minutes, Renton City Council, Sept. 24, 1984, at 1.

small city or town in this country will be capable of setting aside a permissible zone, consistent with its other legitimate interests, for the location of adult theatres. The result of such a development will be loss of control by small cities and towns over the "quality of life" of their communities.

3. The Court of Appeals Erroneously Implied an Improper Legislative Motive

The Ninth Circuit apparently ruled[47] that the expression by citizens at public hearings of views aimed at the content of adult films raised an inference of an improper motive by the City Council, and that even if this motive was merely "a" motivating factor in its zoning decision, this was enough to invalidate the ordinance. App. 20a. The court erred in several respects.

First, there is a serious question as to whether motive or intent—either of citizens or of the City Council itself—has a part to play in a case like this, where any burden on the adult theatre owner's First Amendment interests is only incidental. When independent legitimate reasons exist for minimal restrictions on First Amendment freedoms, this Court has refused to undertake an analysis of the motivation behind the legislative enactment. *See, e.g. United States* v. *O'Brien*, 391 U.S. at 383-386. Here, the legitimate reasons relate to the very protection of neighborhoods through zoning approved in *Young*.

But even if motive or intent is relevant, the Court of Appeals was still wrong to second-guess a city council.

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[47] The District Court noted that the City Council had summarized ideas put forth at public hearings, including concerns reflecting citizens' values "which might be impermissible bases for justification of restrictions affecting first amendment interests." App. 31A. The Court of Appeals interpreted this statement as a recognition that "many of the stated reasons [made by the City Council] for the ordinance were no more than expressions of dislike for the subject matter." App. 19a-20a; footnote deleted.

There was no evidence that any member of the City Council had an improper motive. Nevertheless, the court went behind the specific findings of the Council as to why the ordinance was passed. It apparently concluded that because some citizens at an open meeting expressed personal views adverse to the content of adult films, an inference was raised that at least one motive of the Council itself was improper, and this was sufficient to invalidate the entire ordinance.

The court should not have imputed the motives of some citizens to the City Council. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-270 (1977).[48] The effect of the Ninth Circuit's ruling on city governments would be to cancel hearings preceding the adoption of zoning ordinances, to close them to the public, or to pre-censor approved speakers. None of these results is practical, all are undemocratic, and they may even be unconstitutional in denying citizens their own First Amendment rights to speak. *See City of Madison Joint School District* v. *Wisconsin Employment Relations Comm'n*, 429 U.S., 167, 174-176 (1976). Most jurisdictions (including the State of Washington) now require by law that such proceedings be open to the public, precisely so that citizens can express a wide variety of views on the subjects under consideration. City councils should not be held responsible for the fact that some citizens do not like adult films. As a matter of fact, the Ninth Circuit ruling would constitute an invitation to adult theatre owners such as Playtime to induce citizens to appear at hearings and express impermissible views, thus dooming in advance any subsequently-enacted ordinance, no matter how well intended.

[48] The record in *Young* showed that a number of citizens had complained in that case about content. For example, one Detroit resident whose letter was introduced into evidence complained to the Mayor, "They have pornography available in their back room, and it is disgusting * * *" (Appendix in *Young* at 26), and an attorney for the city conceded: "The concern of the neighborhood over the showing of this kind of movie has been evidenced time and again by picketing, by calls and letters to our office, to the Mayor, to the Common Council and so on." *Id.* at 48.

If the motive of a city council—as opposed to speakers at a hearing—is deemed relevant, a court should look to the predominant motive behind the ordinance. An attempt by a court to define "a" single motivating factor behind a legislative act is simply improper.[49] In this case, all of the City Council's stated reasons were consistent with a concern about *effects*. To the extent that its findings could be said to relate to content, the legislative intent was to oppose not adult films per se but rather the showing of adult films in certain locations. By locating the films nearby, in an accessible and commodious area, the City Council is giving adult films their full play, but without the deleterious effects that evidence has clearly shown will follow if adult theatres are located in all areas of the City.

Finally, even if the City Council's own motives could be said to be based on objectives not heretofore sanctioned by this Court, we respectfully urge that those objectives be approved. It would be ironic indeed if a city could zone adult theatres because of commercial considerations

[49] In *City of Las Vegas* v. *Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984), for example, another panel of the Ninth Circuit held that legislators could not even be questioned about their subjective reasons for passing an ordinance, because the ordinance is to be measured by such objective facts as stated intent and effect. And it was precisely because of this problem of delving into the legislative mind-set that Judge Wallace concurred only in the result in the Ninth Circuit's decision in *Tovar* v. *Billmeyer, supra.* He wrote that the majority, by adopting an "a motivating factor" test (721 F.2d at 1266), was refusing to follow the "clear and precise standard" already adopted by the court in *Ebel* v. *City of Corona*, 698 F.2d at 393, to the effect that an ordinance is unconstitutional only if its "real purpose" is to obstruct the exercise of protected First Amendment rights. 721 F.2d at 1267 (Wallace, J., concurring). He pointed out that the very nature of the legislative process means that there will always be more than a single purpose for any legislative action. *Id.* at 1268.

such as lowering of residential property values, and not on the ground that these theatres have an unstable and debilitating effect on the families living in those same residences. Such a result would elevate property values over human values. The stability and cohesiveness of families and parents' efforts to raise their children in suitable surroundings free from crime and blighted areas are also worthy of protection. These were precisely the kind of principles that this Court recognized as a valid basis for zoning in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, 9 (1974): "It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clear air make the area a sanctuary for people." [50]

Some of the confusion in regard to legislative intent may have been caused by uncertainty arising out of two of this Court's decisions, *Village of Arlington Heights* and *O'Brien*. *Arlington Heights* dealt with a land area rezoned after a developer contracted to build racially integrated housing. The Court held, on the one hand, that a plaintiff need not prove that the challenged action "rested solely on racially discriminatory purposes," because rarely is a legislature motivated by a single concern. "When there is proof that a discriminatory purpose has been *a motivating factor* in the decision [to rezone], * * * judicial deference is no longer justified." 429 U.S. at 265-266; emphasis added; footnote deleted. On the other hand, the Court held that the mere fact that opponents of integrated housing who spoke at various meetings "might have been motivated by opposition to minority groups" did not invalidate the ordinance. *Id.* at 267-270.

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[50] *See also Berman* v. *Parker*, 348 U.S. 26, 32-33 (1954); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 58-59 (1973) (citizens have legitimate interest in protecting "the style and quality of life" and "the total community environment").

The court below focused upon the "a motivating factor" *language* in *Village of Arlington Heights* and wholly ignored this Court's *holding* in that case.

In the second case, *O'Brien*, the Court flatly refused to inquire into legislative motives—an inquiry the Court called "a hazardous matter". The Court ruled that if a statute is otherwise constitutional, courts may look to legislative history for an interpretation of it, but may not void the statute because of perceived intent on the part of some legislators. 391 U.S. at 384.[51] In the instant case, the Ninth Circuit improperly engaged in the "guesswork" eschewed in *O'Brien*.

We respectfully suggest that this Court may have unwittingly given conflicting signals to the lower courts in regard to legislative intent by its decisions in *Arlington Heights* and *O'Brien*. The resulting confusion should now be resolved in the context of attempts by cities to zone adult uses.

4. Cities' Legitimate Attempts to Zone Adult Theatres Are Jeopardized By the Decision Below

In *Young*, this Court was apparently divided over which standard to use in testing the regulation of adult establishments.[52] A plurality of four treated adult films

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[51] *See also Hart Book Stores, Inc.* v. *Edmisten*, 612 F.2d at 820-830.

[52] This split has not gone unnoted by the lower courts (*see* many of the cases in nn.22-26, *supra*) and by the commentators. *E.g.*, Friedman, *Zoning "Adult" Movies: The Potential Impact of Young v. American Mini Theatres*, 28 Hastings L.J. 1293 (1977); Stevenin, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 Hastings Const. L. Q. 321 (1977); Aver, *The Zoning of Adult Entertainment: How Far Can Planning Commissions Go?* 5 Comm/Ent. L.J. 293 (1982); Pearlman, *Zoning and the First Amendment*, 16 Urb. Law. 217 (1984); Note, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854 (1983); Note, *Second Class Speech: The Court's Refinement of Content Regulation*, 61 Neb. L. Rev. 361 (1982); Note, *Municipal Zoning Restrictions on Adult Entertainment:* Young, *Its Progeny and Indianapolis' Special Exceptions Ordinance*, 58 Ind. L. J. 505 (1983).

as meriting a lower level of protection than other films, while Justice Powell reached the same result by application of the *O'Brien* four-part test.

Regardless of which standard is applied, Renton has not violated the First Amendment. Its ordinance is *more* narrowly tailored than that approved in *Young*, because it defines "use" even more restrictively than Detroit did.[53] Since its set-aside area is ample to accommodate all of the adult theatres that could possibly want to locate in the city, no suppression of speech has occurred or could occur.[54]

Applying the *O'Brien* test, it is clear that (i) zoning is within the City's constitutional power; (ii) Renton's ordinance furthers its important and substantial governmental interests, including the prevention of decay in residential and commercial areas and the control of crime; (iii) the assertion of its governmental interests is unrelated to the suppression of free expression but instead is closely tailored to the achievement of those interests; and (iv) any incidental restriction on speech is no greater than is essential in furtherance of Renton's governmental

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[53] The ordinance here requires no separation between adult uses, so that an operator need not consider the character of other uses when locating his business. No special licensing or waiver provisions, with their inherent difficulties of discretion, are included. Likewise, the requirement of continuous exhibition precludes regulation of any incidental or innocent exhibition of sexually explicit material. Renton's ordinance therefore satisfies the concerns expressed by Justice Blackman in his dissenting opinion in *Young*, 427 U.S. at 88-96 (Blackman, J., dissenting).

[54] This case is thus at the furtherest extreme from *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981), where nude dancing was entirely prohibited.

This appeal also does not involve any of the issues presented in another case from the State of Washington presently before the Court, *Brockett v. Spokane Arcades, Inc.*, 725 F.2d 482 (9th Cir.), *prob. juris. noted*, 53 U.S.L.W. 3235 (U.S. Oct. 1, 1984) (Nos. 84-28 and 84-143).

interests because the market for expression of adult films is "essentially unrestrained" in view of the existence of 520 acres available for adult theatres.

If Renton's ordinance is not sustained, no such ordinance can withstand scrutiny, and the hope held out in *Young* for a reasonable approach to the serious secondary effects of adult establishments will be dashed for good.[55] This case, therefore, presents questions of extraordinary importance to small communities throughout the United States. *Young*'s progeny demonstrate the confusion of well intentioned courts seeking to implement this Court's rulings. The lower courts, as well as city governments and city planners, need and deserve thoughtful guidance in dealing with the First Amendment's impact on the zoning of adult theatres. Only if the decision below is reversed can cities' efforts to meet this "admittedly serious problem" [56] be accorded "a sufficient degree of flexibility for experimentation and innovation" [57] in this vital area of "innovative land-use regulation." [58]

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[55] *See* cases cited in nn.23-26, *supra*.

[56] *Young*, 427 U.S. at 71 (plurality opinion).

[57] *Northend Cinema*, 585 P.2d at 1159.

[58] *Young*, 427 U.S. at 73 (Powell, J., concurring).

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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